UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2132

UNITED STATES OF AMERICA

v.

ALBERTO CONCEPCION aka
BERT
Alberto Concepcion

Appellant

On Appeal from the United States District Court
for the District of New Jersey

District Judge Alfred J. Lechner, Jr.
(D.C. Crim. No: 99-cr-00753-1)

Argued April 19, 2001

Before: SLOVITER, RENDELL,
and FUENTES, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued on April 19, 2001.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered July 7, 2000, be, and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

Attest:

/s/ ILLEGIBLE
Clerk

Dated: May 10, 2001

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(Opinion Filed: May 10, 2001)

MEMORANDUM OPINION OF THE COURT

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FUENTES, *Circuit Judge*.

Pursuant to a negotiated plea agreement, Alberto Concepcion pleaded guilty to conspiracy to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 841(a)(1), 846. Thereafter, he was sentenced to a 325 month term of imprisonment. In this appeal, Concepcion contends that the District Court failed to properly advise him of the nature of the offense against him and that it abused its discretion in denying his motion to withdraw his guilty plea. Concepcion additionally argues that the District Court committed clear error by (1) imposing a two level sentence enhancement for obstruction of justice and by (2) assigning Concepcion to criminal history category II. Discerning no error in any of the District Court's rulings, we will affirm.

I

Because we write solely for the parties and not for publication, we need not set forth a detailed recitation of the background for this appeal and will limit our discussion to the resolution of the issues presented. On December 9, 1999, following an 18 month investigation into the distribution of drugs and firearms in the Broadway Townhouses, a federally-funded housing complex in Newark, federal investigators obtained a warrant for the arrest of Alberto Concepcion. On December 17, 1999, a federal grand jury returned an indictment charging Concepcion in Count One with knowingly and intentionally conspiring to distribute and possess with intent to distribute more than 100 grams of heroin in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. Count Four of the indictment charged Concepcion with knowingly and intentionally distributing and possessing with intent to distribute a quantity of heroin, a schedule I controlled substance, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The other counts of the indictment charged his associates with related crimes.

In March 2000, Concepcion commenced discussions with the U.S. Attorney's office in Newark regarding a plea agreement. Soon thereafter, Concepcion accepted an agreement wherein he would plead guilty to Count I of the indictment and consent to the forfeiture of two automobiles. The government agreed in exchange to dismiss Count IV. In conjunction with the plea agreement, Concepcion agreed to stipulate at sentencing that, in regard to the conspiracy, "the amount of heroin reasonably foreseeable, and thus attributable, to him is at least 3 kilograms but less than 10 kilograms. *See* U.S.S.G. § 3B1.1(b). Accordingly, the applicable base offense level for this case is 34." On March 16, 2000, Concepcion pleaded guilty to Count One of the indictment. Dur-

ing the plea hearing, the District Court reviewed with the defendant the nature and consequences of the plea.

Subsequently, by letter dated May 26, 2000, Concepcion filed objections to the PSR in which he asserted his innocence in regard to the drug conspiracy. On June 29, 2000, one day before his sentence and more than three months after his guilty plea, Concepcion filed a motion withdraw his guilty plea. On June 30, 2000, the District Court granted Concepcion a hearing on his motion to withdraw the plea. Concepcion contended that he could offer "fair and just" reasons entitling him to withdraw his plea. The District Court allowed Concepcion to testify, during which testimony he stated he knew that making statements contrary to his plea agreement, if later viewed untruthful by the court, could result in an upward adjustment in his sentence on grounds of obstruction of justice. Concepcion nevertheless testified that his plea of guilty was entered with the hope of causing the ongoing insurance fraud investigation against his brother and sister to terminate. Concepcion asserted that he was in fact innocent of conspiracy with the named associates, although he admitted selling drugs to a confidential informant. The District Court permitted no other witnesses. Concepcion offered three exhibits in support of his motion, all accepted by the court: (1) a polygraph examination record; (2) a taped telephone conversation between Kaiser Carter, an ex-girlfriend of Concepcion. and Jorge Retamar, an associate of Concepcion, in which Retamar denied that Concepcion sold him drugs during the period specified in the indictment; and (3) Concepcion's objection to the PSR.

On July 7, 2000, the District Court denied Concepcion's motion to withdraw his plea agreement. The court found that Concepcion's testimony regarding his state of duress in entering the plea agreement was not credible. Finding that Concepcion testified untruthfully in his attempt to

withdraw his plea, the District Court determined that Concepcion's attempt constituted obstruction of justice meriting a two level enhancement of his sentence. The District Court explained that Concepcion was not credible in part because he failed to identify any specific information about the feared investigation of his siblings, and because he could not even identify with certainty the police agencies involved in the investigation. In sentencing Concepcion, the District Court assigned him to Criminal History Category II based on a prior state court conviction for death by auto in the third degree.

The District Court had jurisdiction of this matter pursuant to 18 U.S.C. § 3231. This court holds jurisdiction over the challenges to the conviction pursuant to 28 U.S.C. § 1291 and over the challenges to the sentence pursuant to 18 U.S.C. § 3742(a). Because Concepcion did not raise the argument at the trial level that his guilty plea was not valid, we review for plain error. *United States v. Knobloch*, 131 F.3d 366, 367 (3rd Cir. 1997). We review the District Court's denial of Concepcion's motion to withdraw his guilty plea for abuse of discretion. *United States v. Trott*, 779 F.2d 912, 915 (3rd Cir. 1985). We review the District Court's determination of whether Concepcion merited a two-level enhancement for obstruction of justice for clear error. *United States v. Powell*, 113 F.3d 464, 467 (3rd Cir. 1997). We review the District Court's decision to assign Concepcion to Criminal History Category II for plain error, *See* Fed. R. Crim. P. 52(b); *see also Johnson v. United States*, 520 U.S. 461, 466-67 (1997).

II

A. The Guilty Plea

Concepcion's initial contention is that the District Court did not apprise him of the nature of his offense and that this court must therefore vacate his guilty plea. He maintains that the plea colloquy was faulty because the District Court did not advise him of the nature of his charged offense of conspiracy to violate 21 U.S.C. § 841(a)(1), as articulated in § 846. We find, however, the District Court engaged in a careful and thorough plea colloquy with the defendant in which the defendant showed a clear understanding of the charge against him, including the fact that he was accused of dealing in more than 100 grams of heroin. Specifically, the District Court reviewed with Concepcion the charge in the indictment, stating the amount and types of drugs involved in the conspiracy and Concepcion's knowing and voluntary participation in the drug enterprise:

THE COURT: Let me just review it with you. . . . It indicates in the first paragraph you're pleading guilty to count one of the indictment which charges you with conspiracy to distribute more than 100 grams of heroin. Is that correct?

CONCEPCION: Yes, sir.

THE COURT: In the second page, it sets forth the penalties that you could suffer as a result of your plea. Did you talk with your attorney about these penalties?

CONCEPCION: Yes, sir.

THE COURT: Do you understand that this violation has a statutory minimum penalty of five years imprisonment and a maximum penalty of 40 years imprisonment. . . ?

CONCEPCION: Yes, sir. . . .

THE COURT: Now, have you and your attorney talked about the elements of the offense that the Government must prove beyond a reasonable doubt in order to obtain a conviction in this case?

CONCEPCION: Yes, sir.

THE COURT: Those elements are set forth on . . . page three [of the U.S. Attorney's letter to the Court] and they are two in number: First, that the conspiracy described in the indictment was voluntarily and intentionally formed and existing at or about the time charged; and second, that you knowingly and voluntarily joined that conspiracy. Do you understand those elements?

CONCEPCION: Yes, sir. . . .

THE COURT: Now, do you understand that at a trial, as I mentioned a few moments ago, the Government is required to prove each element of the offense charged and do so beyond a reasonable doubt and by entering this plea, you're giving up that right?

App. 48-51, 54. The District Court not only read the indictment to Concepcion, but confirmed that Concepcion had read the indictment, consulted with his attorney and understood the government's obligation to prove all the elements of the offense beyond a reasonable doubt. Even if the District Court had erred, there was no plain error because, in the plea agreement, Concepcion admitted that he had dealt with 3 to 10 kilograms of heroin in the course of the conspiracy charged in the indictment. Additionally, the District Court advised Concepcion of the maximum and minimum sentences applicable to his offense. The court told Concepcion that a conviction for his offense carried a "statutory minimum penalty of five years imprisonment and a maximum penalty of 40 years imprisonment." We conclude that the District Court clearly and unambiguously informed Concepcion of the nature of the offense and the consequences of the plea.

B. Obstruction of Justice

We turn next to Concepcion's contention that the court erred when it imposed a two level enhancement for obstruction of justice. During the plea withdrawal hearing, Concepcion testified that he was in fact innocent and had only entered his guilty plea under duress. He claimed that he pleaded guilty only to protect his siblings from a continuing investigation. United States Sentencing Guidelines Section 3C1.1 provides:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. During the June 30, 2000, hearing, the District Court had an opportunity to observe Concepcion's demeanor and appearance and to evaluate his credibility and sincerity as he testified. Based on its observations and its overall assessment of the evidence, the court could certainly conclude that Concepcion was not truthful. *See United States v. Kim*, 27 F.3d 947, 961 (3d Cir. 1994). Before imposing the enhancement, the court noted that the statements of Concepcion's co-defendants all supported his initial plea of guilty and that Concepcion could not substantiate the nature or existence of the alleged investigation that created the alleged duress. In these circumstances, we find that the District Court did not err when it concluded, by a preponderance of the evidence, that Concepcion perjured himself and engaged in obstructive conduct as contemplated under § 3C1.1. *Id.* Further, we find no merit to Concepcion's arguments that the District Court failed to give sufficient weight to the submitted tape of the Retamar conversation, to the polygraph exam, or to Concepcion's offer to present witnesses in support of his contention of duress. We will therefore affirm the District Court's finding that Concepcion engaged in obstruction of justice meriting a two level increase under U.S.S.G. § 3C1.1 and its decision to deny the motion to withdraw the guilty plea.

C. Criminal History Category

Finally, Concepcion maintains that the District Court erred in assigning him a Criminal History of Category II rather than I. The court arrived at this decision over the objection of defense counsel, who argued that Concepcion served but 15 days in jail and six months of house arrest on his prior sentence of imprisonment. The District Court subsequently sentenced Concepcion to a cus-

todial term of 325 months, a sentence in the middle of the guideline range for an offense level of 39 and a Criminal History Category of II. Concepcion asserts that his prior state conviction did not constitute a prior sentence of imprisonment. He acknowledges that his prior judgment of conviction sentenced him to 364 days incarceration. He claims, however, that the sentence provided that he could apply for admission to Essex County's "Eclipse Program," and that participation in that program would suffice as a substitute for incarceration.

The Eclipse Program, for which state inmates apply following conviction, utilized a house arrest format, implementing electronic bracelets to monitor non-violent offenders. Application Note 4 to U.S.S.G. § 4A1.2 states, "A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g., $1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence." Although the state trial court judge remarked that Concepcion could apply for admission to the Eclipse Program, he did not sentence Concepcion directly to the program. Rather, the trial court imposed a specific term and peripherally indicated that Concepcion could seek admission to the program as a means of altering the condition of his sentence. Because a reference by the trial judge to the Eclipse Program does not render a sentence non-incarcerative, the probation officer drafting the presentence report determined that Concepcion had accrued two criminal history points pursuant to U.S.S.G. § 4A1.1(b) for his prior sentence of at least sixty days. We agree in this assessment.

Moreover, because Concepcion raises this issue for the first time on appeal, we review the District Court's determination only for plain error. *See* Fed. R. Crim. P. 52(b); *see also Johnson v. United States*, 520 U.S. 461, 466-67 (1997). Even if the District Court erred in assign-

ing Concepcion to Criminal History Category II, this error did not affect his substantial rights. Given his offense level of 39, Concepcion's guideline range within Category I would be 262 to 327 months. The District Court, accordingly, could have imposed the same 325 month sentence without assigning Concepcion to Criminal History Category II.

III

For the reasons stated above, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing opinion

/s/ Julio M. Fuentes
Circuit Judge

[10] to prison for an additional period of up to three years?

A Yes, sir.

Q Now, as I understand it, you have agreed that as a result of this violation, you're going to consent and not contest the forfeiture of personal property, specifically a white 1998 Lexus LS400 and a white 1997 International flatbed tow truck. Is that correct?

A Yes, sir.

Q And also I understand that you have agreed that the forfeiture of these items is not excessive under the Eighth Amendment to the Constitution of the United States.

Is that what you agreed?

A Yes, sir.

Q You talked about that with your attorney?

A Yes, sir.

Q He's explained all that to you?

A Yes, sir.

Q And you also understand that that forfeiture will in no way prevent me or any other sentencing judge from ordering restitution and/or imposing a fine?

A Yes, sir.

Q Now, have you and your attorney talked about the elements of the offense that the Government must prove beyond a reasonable doubt in order to obtain a conviction in this case?

A Yes, sir.

[11] Q Those elements are set forth on page two—page three and they are two in number: First, that the conspiracy described in the indictment was voluntarily and intentionally formed and existing at or about the time charged; and second, that you knowingly and voluntarily joined that conspiracy.

Do you understand those elements?

A Yes, sir.

Q Now, have you or has anybody on your behalf made arrangements with any judge concerning sentencing in this case?

A No, sir.

Q Has anybody told you or promised you that if you pled guilty you would receive a light sentence or, indeed, any particular sentence?

A No, sir.

Q As you stand here now, are you satisfied with the services of your attorney?

A Yes, sir.

Q Do you have any questions or concerns which you feel he has not adequately answered?

A No, sir.

Q Whose decision is it to enter this plea, yours or your attorney's?

A Mine.

Q Now, has your attorney explained to you that this is a felony offense?